No. 82-2040

In the Supreme Court of the United States

OCTOBER TERM, 1983

KENNETH WARD THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether admission at petitioner's criminal trial of the grand jury testimony of two witnesses who disappeared prior to trial violated the Confrontation Clause or Fed. R. Evid. 804(b)(5).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 705 F.2d 709.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1983. The petition for a writ of certiorari was filed on June 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner and co-defendant John David Curtis were convicted of conspiracy to import marijuana in violation of 21 U.S.C. 963 (Count 1); conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846 (Count 2); importation of marijuana, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2

(Count 3); and possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 4). Petitioner was sentenced to concurrent five-year terms on Counts 1 and 2, and concurrent five-year terms (with 15 years' special parole) on Counts 3 and 4, to run consecutively with the sentence on Counts 1 and 2.

1. The evidence at trial showed that in late August, 1980 the Drug Enforcement Administration made extensive efforts to locate the fishing vessel Gulf Princess II—which it had reason to believe was engaged in marijuana smuggling—off the coast of South Carolina. On August 29, 1980 the boat was sighted off Edisto Island, South Carolina, at 3:11 p.m. by Robert Spraitz, an employee of the National Marine Fishery Service who was flying a plane along the South Carolina coast. Shortly before nightfall Spraitz returned in his plane to the area, but was unable to relocate the boat (Tr. 120-128). The Coast Guard Cutter Cape Knox, arriving at Edisto Island about 8:00 p.m. the same day, was also unable to locate the Gulf Princess. At about 11:00 p.m., however, the Cape Knox made radar contact with the Gulf Princess as she was leaving South Carolina inland waters via St. Helena Sound (*id.* at 143-145).

When the Coast Guard boarding party boarded the Gulf Princess it found no ice, shrimp, or fish in the hold. The hold had been recently washed with Clorox and the crew appeared very tired (*id.* at 184-186). After daylight the next morning the boarding party found marijuana residue scattered along the gunnels on the port side, on the deck, and around the bumpers and fenders. The head of the boarding party testified that "[i]t looked like they may have been tracking it on their feet and got in the bunks with it. It was in the bunks and on the sheets" (*id.* at 184-185). Petitioner himself was stopped in an attempt to sweep marijuana residue overboard (*id.* at 187).

When the Gulf Princess was stopped there were three persons on board: petitioner (the vessel's master) and Kenneth Gorman and John David Curtis (the crew). Gorman testified before the grand jury that petitioner had recruited him for the smuggling venture aboard the Gulf Princess, which left Florida on July 29 or 30, 1980, and arrived off the coast of Colombia, South America some nine days later. While waiting for the pickup, Gorman stated, they met another shrimp boat, and petitioner had a conversation with its captain. Eventually the Gulf Princess took on some 200 bales of marijuana and left, arriving off Edisto Island, South Carolina eight or nine days later. There they shrimped for several days, and on the evening of August 29, 1980 entered St. Helena Sound, where they were led by a small boat to the site where the marijuana was unloaded. The Gulf Princess then headed out St. Helena Sound and was intercepted and boarded by the Coast Guard. (Tr. 281-297.)

Gordon Hastings, a commercial fisherman and captain of another shrimpboat, also testified before the grand jury that on August 10, 1980 he met the Gulf Princess II off the coast of Colombia near Riohacha. He said that the vessel had no shrimping permit, and that the hold area where shrimp are stored was open. Hastings testified that he spoke for some 30-40 minutes with the captain of the Gulf Princess, whom he later identified from a photo spread as petitioner.[1] He said that the vessel left the coast of Colombia around the 15th or 16th of August. (Tr. 309-319.)

2. Before trial the government moved to read into the record the grand jury testimony of Gorman and Hastings. The government asserted that it had maintained direct contact with Hastings and contact with Gorman through his

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[1]DEA Special Agent Charles Shamming testified at trial that he had shown Hastings the photo spread, and that Hastings had identified petitioner as the captain of the Gulf Princess II (Tr. 336-339).

lawyer for much of the period between the grand jury and trial. Despite numerous efforts to subpoena both men for trial, however, the government was unable to locate them.

After reviewing the transcripts and hearing testimony from a Deputy United States Marshal, a DEA agent, Gorman's girlfriend, and his attorney, the district court found that the government had made a reasonable effort to obtain the presence of the two witnesses (Tr. 75), and that they were "unavailable" within the meaning of Fed. R. Evid. 804(b)(5). The court also concluded that the transcripts were reliable and trustworthy, and hence admissible under Rule 804(b)(5) and the Confrontation Clause. In determining trustworthiness, the court noted that both statements were given under oath, that neither witness had recanted his testimony, and that the testimonies corroborated each other even though Hastings was an innocent party and Gorman was an active participant (Tr. 77-80).

3. The court of appeals affirmed (Pet. App. 1-8). The court agreed that the grand jury testimony was properly admitted under Rule 804(b)(5) and the Confrontation Clause. It held that the government had used "reasonable means" to procure the attendance at trial of Gorman and Hastings (Pet. App. 7).

ARGUMENT

1. Petitioner claims (Pet. 4-8) that the court of appeals' decision in this case conflicts with decisions in other circuits concerning the admissibility of grand jury testimony by witnesses who are unavailable at trial. This claim is without merit.

Petitioner correctly notes (Pet. 6) that in a number of cases grand jury testimony has been admitted because the defendant, through coercion, prevented the witness from

testifying at trial.[2] In such cases the simple explanation for the admissibility of the grand jury testimony is that the defendant has waived his rights under the Confrontation Clause and, a fortiori, his objections to the admission of hearsay evidence.

In numerous other situations, however, similar testimony has been admitted even absent a showing of coercion. This Court has repeatedly declined review.[3] The predicate for admissibility in these situations—under both the Rules of Evidence (Fed. R. Evid. 804(b) ("the declarant is unavailable")) and the Confrontation Clause (*Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980) ("the prosecution must * * * demonstrate the unavailability of[] the declarant"))—is that the declarant has died, unaccountably disappeared, or refused to repeat his earlier testimony. Even then, however, admissibility under both the Constitution and the Rules is contingent on a showing that the grand jury testimony bears certain " 'indicia of reliability' " (*Ohio* v. *Roberts, supra*, 448 U.S. at 66) or, stated differently, contains "circumstantial guarantees of trustworthiness" (Fed. R. Evid. 804(b)(5)).

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[2]See *United States* v. *Mastrangelo*, 693 F.2d 269 (2d Cir. 1982); *United States* v. *Thevis*, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Carlson*, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977); *United States* v. *Balano*, 618 F.2d 624 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980).

[3]See, *e.g.*, *United States* v. *Murphy*, 696 F.2d 282 (4th Cir. 1982), cert. denied, No. 82-6300 (May 23, 1983); *United States* v. *Garner*, 574 F.2d 1141 (4th Cir.), cert. denied, 439 U.S. 936 (1978); *United States* v. *Barlow*, 693 F.2d 954 (6th Cir. 1982), cert. denied, No. 82-6408 (May 23, 1983); *United States* v. *Boulahanis*, 677 F.2d 586 (7th Cir. 1982), cert. denied, No. 82-263 (Nov. 15, 1982). See also *United States* v. *Thomas*, 705 F.2d 709 (4th Cir. 1983), petition for cert. pending, No. 82-2040 (filed June 11, 1983); *United States* v. *West*, 574 F.2d 1131 (4th Cir. 1978); *Tolbert* v. *Jago*, 607 F.2d 753 (6th Cir. 1979), cert. denied, 444 U.S. 1022 (1980); *United States* v. *Medico*, 557 F.2d 309 (2d Cir.), cert. denied, 434 U.S. 986 (1977); *United States* v. *Ward*, 552 F.2d 1080 (5th Cir.), cert. denied, 434 U.S. 850 (1977).

Not all grand jury testimony can satisfy these rigorous standards; the issue must necessarily be disposed of on a case-by-case basis. The courts of appeals have subscribed to that approach, and none has rejected all grand jury testimony as unreliable.[4] The court of appeals' decision in this case that Gorman's and Hastings' grand jury testimony was sufficiently reliable to warrant its admission is fully in accord with this consensus. Review of that fact-bound determination by this Court is not warranted.

It is important to recognize at the outset that Gorman's and Hastings' testimony before the grand jury was given under oath, and subject to penalties of perjury. Contrast *United States* v. *Ward, supra; United States* v. *Medico, supra; Steele* v. *Taylor,* 684 F.2d 1193 (6th Cir. 1982). Both men also testified on the basis of personal knowledge about events in which they had participated, and there was little likelihood of either misperception or faulty recollection. *Dutton* v. *Evans,* 400 U.S. 74, 88-89 (1970); *United States* v. *Barlow, supra,* 693 F.2d at 962. Hastings, who

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[4]Compare *United States* v. *Gonzalez,* 559 F.2d 1271 (5th Cir. 1977); *United States* v. *Fiore,* 443 F.2d 112 (2d Cir. 1971), cert. denied, 410 U.S. 984 (1973), with cases cited in note 3, *supra.* In *United States* v. *Gonzalez, supra,* the court of appeals held a grand jury witness's testimony to be inadmissible under Rule 804(b)(5) when the witness refused to testify at trial. Unlike this case, however, there the court found that the witness's testimony was not corroborated by other independent evidence, and that the witness had been extremely reluctant to testify before the grand jury. 559 F.2d at 1272-1274. Although the court in *United States* v. *Fiore, supra,* held that the government had improperly used grand jury testimony at trial, the case was decided before the enactment of the Federal Rules of Evidence and the decision of this Court in *Ohio* v. *Roberts, supra,* and perhaps for that reason made no inquiry into the question of reliability.

In both *United States* v. *Thevis, supra* note 2, and *United States* v. *Balano, supra* note 2, relied on by petitioner (Pet. 7), the courts of appeals held that the grand jury testimony of an unavailable witness was admissible.

identified petitioner from a photo spread, was an entirely disinterested witness. *United States* v. *Boulahanis, supra,* 677 F.2d at 588-589. The two stories, given by people who had no apparent connection with one another, were consistent in their details about petitioner's conversation with Hastings, the time spent off the coast of Colombia, the fact that the Gulf Princess was not engaged in shrimping, and so on. More important, the testimony of each was corroborated by independent evidence introduced at trial. DEA Special Agent Charles Shamming verified Hastings' identification of petitioner from the photo spread. Gorman's more damaging testimony about the marijuana cargo was not only verified, but made virtually incontestable, by the marijuana residue that covered the vessel from bunks to fenders. His description of the delivery from Edisto Island to St. Helena Sound was corroborated by the testimony of Robert Spraitz and those aboard the Cape Knox. Cf. *United States* v. *West, supra,* 574 F.2d at 1135; *United States* v. *Garner, supra,* 574 F.2d at 1144-1146; *United States* v. *Murphy, supra,* 696 F.2d at 286; *United States* v. *Barlow, supra,* 693 F.2d at 962, 964-965; *United States* v. *Boulahanis, supra,* 677 F.2d at 588-589.

2. Petitioner also claims (Pet. 8-10) that the court of appeals' decision in this case is inconsistent with this Court's decisions interpreting the Confrontation Clause. According to petitioner, those cases establish a requirement that unless out-of-court statements fit "under a traditional exception to the hearsay rule," they are not admissible unless they have been subjected to "some form of cross examination" (Pet. 10). This contention is without merit.

It is true, as this Court has pointed out, that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.' " *Ohio* v. *Roberts, supra,* 448 U.S. at 66 & n.8. It is also true that

this Court has upheld the admission of out-of-court statements when the declarant was unavailable at trial because prior cross-examination has satisfied the Confrontation Clause's concern about reliability. *Id.* at 72-73; *California* v. *Green,* 399 U.S. 149, 165-168 (1970). But it is not a necessary condition of admissibility that prior testimony fit neatly into one or the other of those two categories. On the contrary, the test laid down by this Court is that hearsay

> is admissible only if it bears adequate "*indicia of reliability.*" Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent *a showing of particularized guarantees of trustworthiness.*

Ohio v. *Roberts, supra,* 448 U.S. at 66 (emphasis added).

As already explained, the testimony in this case satisfies the "reliability" and "trustworthiness" demands of both the Confrontation Clause and Fed. R. Evid. 804(b)(5). It might be argued that satisfaction of the Rule's requirements does little to advance the constitutional inquiry, since Rule 804(b)(5) is not a "firmly rooted hearsay exception." But the issue is not significantly different from that presented in *Dutton* v. *Evans, supra.* There the question was the admissibility of a hearsay statement made by one Williams to a fellow prisoner on returning to the penitentiary from his arraignment. The trial court admitted the statement under a state co-conspirator exception that was, as this Court "readily conceded," more liberal than the corresponding federal rule (400 U.S. at 81). This Court nevertheless upheld the admission of Williams' statement, in large part because it found "indicia of reliability" quite apart from the statement's conformity with a hearsay exception (*id.* at 88-89).

We do not contend that all statements made before a grand jury are, without more, sufficiently reliable to satisfy the demands of the Confrontation Clause. Instead, as the courts of appeals have recognized, the decision about reliability—and hence admissibility—is necessarily a factual one whose outcome will differ from case to case. There can be little doubt, however, that in this case the constitutional requirements elucidated by this Court were satisfied.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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